IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANE FAUST,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DAVID CLEE, et al.,	:	**No. 03-1436**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **October 23, 2006**

Plaintiff Jane Faust brings this action against Defendants Bensalem Township, Officer David Clee, Officer John Domanico, Jr., and Sergeant Bickley alleging that Defendants violated her constitutional rights by, *inter alia*, using excessive force during her arrest. Presently before the Court is Defendants' motion for summary judgment. For the following reasons, Defendants' motion is granted in part and denied in part.

I. BACKGROUND

Late in the evening on March 6, 2001, Plaintiff's husband telephoned 911 to report that his adult son was destroying his house and beating Plaintiff and himself. (Defs.' Mot. for Summ. J. Ex. E. (Tr. of 911 Tape at 1)). He asked the dispatcher to send police immediately. (*Id.*) Defendant police officers responded to the call and entered Plaintiff's home. (Defs.' Mot. for Summ. J. Ex. G [hereinafter Pl.'s Dep.] Volume II at 11-12). Officer Clee, one of the responding officers, had a history with Plaintiff's son. (Pl.'s Dep. Volume II at 11-12 & Volume I at 74-75, 97). Plaintiff, who was 72 years old, was upset by Officer Clee's presence because she felt that he had mistreated her son in the past. (*Id.* Volume II at 11-12). She was further angered when Officer Clee berated both her and her son. (*Id.* at 14). Plaintiff then slapped Officer Clee in the face. (*Id.* at 15).

Although many of the subsequent events are in dispute, the parties agree that Officer Clee placed Plaintiff under arrest and brought her to the Bensalem police station. (*Id.* at 21, 42). Once at the station, Plaintiff experienced the early warning signs of a pending asthma attack. (*Id.* at 47-48). Within a "short period of time" after she told a police officer that she wanted her inhaler because she was having trouble breathing, paramedics arrived. (*Id.* at 54-55). After examining Plaintiff, the decision was made to transport her to the hospital. (*Id.* at 57). Plaintiff received care at the hospital, and upon her discharge she was taken back to the Bensalem police station in the morning hours of March 7, 2001. (*Id.* at 64-72, 75).

Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983 against Defendants on March 7, 2003, alleging that her Fourth, Eighth, and Fourteenth Amendment rights were violated during the course of her arrest.[1] (Pl.'s Compl. ¶ 7). More specifically, she alleges that Defendants violated her right to be free from false arrest and imprisonment, imposed cruel and unusual punishment, used excessive force in effectuating her arrest, and denied her adequate medical attention. (*Id.* ¶¶ 24-27, 31-36). She also included a *Monell* claim against Bensalem Township for allegedly maintaining policies and customs that manifested deliberate indifference to Plaintiff's constitutional rights and a state law claim against the police officers for assault and battery.[2] (*Id.* ¶¶ 37-42, 28-30). On

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[1] Section 1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

42 U.S.C. § 1983 (2000).

[2] To sustain a claim against a municipality under Section 1983, a plaintiff must show: (1) a custom or policy of such long-standing effect as to have the force of law; and (2) that one of the

August 10, 2006, Defendants moved for summary judgment as to all of Plaintiff's claims and asserted a qualified immunity defense. Plaintiff's response contends that genuine issues of material fact exist with respect to some of her claims but concedes that she cannot state a claim under *Monell* or for false arrest or imprisonment, and she has explicitly agreed to withdraw those counts. (Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J. at 2, 4).

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

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municipality's employees violated the plaintiff's rights while acting in accordance with that custom or policy. *Monell v. Dep't of Soc. Serv. of N.Y.*, 436 U.S. 658, 690-91 (1978).

III. DISCUSSION

A. Assault and Battery Claims

Under Pennsylvania law, an assault is "an intentional attempt by force to do an injury to the person of another and a battery is committed whenever the violence menaced in an assault is actually done . . . ." *Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994) (citation omitted). A police officer "may use reasonable force to prevent interference with the exercise of his authority or the performance of his duty." *Id.* In the context of an arrest, reasonable force means "such force as is necessary under the circumstances to effectuate the arrest." *Id.* There are genuine issues of material fact as to whether Officer Clee used reasonable force in effectuating Plaintiff's arrest. Accordingly, summary judgment is denied as to Officer Clee.[3] With respect to Officer Domanico and Sergeant Bickley, however, summary judgment is granted because there is no evidence that either man threatened Plaintiff or used unreasonable force during the course of Plaintiff's arrest and detention. (Pl.'s Dep. Volume I at 114).

B. Eighth Amendment Cruel and Unusual Punishment Claim

The Eighth Amendment's protection against cruel and unusual punishment applies only to people convicted of a crime. *Bell v. Wolfish*, 441 U.S. 520, 535-37, 537 n.16 (1979). Because Plaintiff was a pretrial detainee and not a convicted prisoner, the Court grants Defendants' motion

[3] Pennsylvania's state qualified immunity provision does not shield Officer Clee because a jury crediting Plaintiff's account of her arrest could reasonably conclude that Officer Clee knew that his conduct was wrong, thus vitiating immunity. *See Walker v. N. Wales Borough*, 395 F. Supp. 2d 219, 231 (E.D. Pa. 2005) (citing 42 PA. CONS. STAT. ANN. 8550, which removes immunity where an official engages in "willful misconduct"); *Holloway v. Brechtse*, 279 F. Supp. 2d 613, 615-16 (E.D. Pa. 2003) (denying motion to dismiss on state qualified immunity grounds where plaintiff alleged that defendant officer committed an intentional tort).

for summary judgment on this claim. *See Green v. N.J. State Police*, Civ. A. No. 04-0007, 2006 WL 2289528, at *3 (D.N.J. Aug. 9, 2006) (citing *Fuentes v. Wagner*, 206 F.3d 335, 344 n.11 (3d Cir. 2000)).

C. Claim for Failure to Provide Adequate Medical Attention

The Court construes Plaintiff's Complaint as alleging a violation of the Fourteenth Amendment by failing to provide adequate medical attention to Plaintiff while she suffered an asthma attack. "[T]o state a claim for unconstitutional deprivation of medical care under the Fourteenth Amendment, a plaintiff must allege (1) a serious medical need and (2) acts or omissions by the police officers that indicate deliberate indifference to that need." *Hogan v. City of Easton*, Civ. A. No. 04-759, 2006 WL 2645158, at *18 (E.D. Pa. Sept. 12, 2006) (citing *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 582 (3d Cir. 2003)); *see also Hubbard v. Taylor*, 399 F.3d 150, 166 n.22 (3d Cir. 2005) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). An officer displays deliberate indifference toward the needs of those under his supervision when he acts with a conscious disregard of a substantial risk of serious harm. *Kaucher v. County of Bucks*, 455 F.3d 418, 427-28 (3d Cir. 2006).

Here, there is insufficient evidence to sustain a cause of action for failure to provide adequate medical attention. Plaintiff admits that paramedics attended to her within minutes of when she informed the officers that she was experiencing breathing difficulties. (Pl.'s Dep. Volume II at 54-55). The fact that Plaintiff would have preferred to have her inhaler immediately is of no legal significance because the Fourteenth Amendment does not require officials to adopt any particular course of treatment in response to a detainee's medical needs. *See Smith v. Municipality of Lycoming County*, Civ. A. No. 05-1729, 2006 WL 2474064, at *6 (M.D. Pa. Aug. 25, 2006) (citing

Durmer v. O'Carrol, 991 F.2d 64, 69 (3d Cir. 1993) and *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004)). The Fourteenth Amendment is not violated where, as here, officers respond to a request for medical attention with a prompt call to the paramedics and they arrive within minutes of the detainee's entreaty. *See Alford v. Owen*, Civ. A. No. 03-795, 2005 WL 2033685, at *5 (D.N.J. Aug. 23, 2005) (rejecting deliberate indifference claim because, in part, plaintiff taken to hospital immediately after injury causing incident); *see also Washington v. LaPorte County Sheriff's Dept.*, 306 F.3d 515, 518-19 (7th Cir. 2002) (promptly transferring inmate to hospital when peril of situation became clear displays "deliberate care, not deliberate indifference") (citations omitted). Accordingly, Defendants' motion for summary judgment on Plaintiff's Fourteenth Amendment claim for failure to provide adequate medical treatment is granted.

D. Use of Excessive Force Claim

"[C]laims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." *Graham v. Conner*, 490 U.S. 386, 395 (1989). The excessive force inquiry assess whether the officers' actions were "'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397; *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004). Whether an officer's actions constitute excessive force is a reasonableness inquiry usually sent to the jury. *Kopec*, 361 F.3d at 777. In determining whether the force used was reasonable, the situation must be viewed from the perspective of a reasonable officer at the scene at the time of the incident. *Graham*, 490 U.S. at 396-97. Careful attention must be paid "to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [s]he is actively

resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Other factors include "the duration of the [officer's] action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time." *Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997).

1. Qualified Immunity in Connection with Excessive Force

Qualified immunity protects police officers from having to defend lawsuits if their conduct did not violate clearly established statutory or constitutional law of which a reasonable person would have been aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The Third Circuit has established a two-part framework for addressing the qualified immunity defense. *Curley v. Klem*, 298 F.3d 271, 277 (3d Cir. 2002). First, the Court must decide whether the facts alleged show that Defendant Officers' conduct violated a constitutional right. *Id.* If Plaintiff adequately supports her assertion that Defendants violated her constitutional right to be free from excessive force, then the Court must determine whether such right was "clearly established" at the time Defendant Officers acted. *See id.* A right is clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). When an officer's conduct violates a clearly established constitutional right, the court must reject the qualified immunity defense. *Id.* Both the question whether the law was clearly established and whether the officer's actions were objectively reasonable are matters of law. *Sharrar*, 128 F.3d at 828. Only where there are disputes of historical fact regarding the officer's conduct does the case go to the jury. *Id.*

The intersection of qualified immunity and excessive force presents a somewhat unique scenario for purposes of summary judgment because both qualified immunity and use of excessive

force turn on reasonableness. Although the question of whether an officer's use of force was excessive is generally left to the jury, a district court may nonetheless grant summary judgement on the basis of qualified immunity if "the officer's use of force was objectively reasonable under the circumstances." *Kopec*, 361 F.3d at 777; *see also Mellott v. Heemer*, 161 F.3d 117, 121 (3d Cir. 1998) (right to be free from excessive force clearly established, but qualified immunity still protects officers who use excessive force "if, at the time they acted, they reasonably could have believed that their conduct" was not excessive). Thus, the questions for this Court are: (1) whether the facts, taken in the light most favorable to Plaintiff, establish that Defendants used excessive force; (2) whether the right not to be subject to excessive force is clearly established; and (3) whether a reasonable officer would have believed that Defendants' conduct deprived Plaintiff of her clearly established constitutional rights. *See Reynolds v. Smythe*, 418 F. Supp. 2d 724, 734-35 (E.D. Pa. 2006).

2. Excessive Force Claim Against Officer Clee

There are genuine disputes of historical fact that prevent summary judgment as to Plaintiff's excessive force claim against Officer Clee. *See Rusch v. Versailles Borough*, Civ. A. No. 05-0138, 2006 WL 2659275, at *5-*6 (W.D. Pa. Sept. 15, 2006) (denying summary judgment on excessive force claim where plaintiff's version of events amounted to violation of clearly established law); *Pagan v. Twp. of Raritan*, Civ. A. No. 04-1407, 2006 WL 2466862, at *6-*7 (D.N.J. Aug. 23, 2006) (same). Plaintiff's account of the events surrounding her arrest differs markedly from the version provided by Defendant Officers. Construing the evidence in the light most favorable to Plaintiff, she has stated a claim under the Fourth Amendment for use of excessive force with respect to: (1) the manner in which Officer Clee subdued Plaintiff after she struck him; (2) whether Officer Clee threw Plaintiff into the hedge outside her house; (3) whether Officer Clee thrust Plaintiff into her van on

the walk to the police car; (4) whether Officer Clee dragged Plaintiff through the snow without affording her the opportunity to put on shoes or a coat; (5) whether Officer Clee threw Plaintiff into the backseat of the police car; and (6) whether Officer Clee deliberately slammed on the breaks of his car so as to cause Plaintiff to slam into the screen separating the front and back seats. (Pl.'s Dep. Volume II at 20-21, 24-25, 29-30, 31, 34-35, 38-39). *See also Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 146 (3d Cir. 2002) (district court must set forth disputed facts relevant to qualified immunity). Moreover, if Plaintiff's allegations are true, Officer Clee would not be entitled to qualified immunity because the right not to be subject to excessive force is clearly established and Officer Clee could not reasonably have believed that his use of force was lawful. *Couden*, 446 F.3d at 497. Thus, the Court denies summary judgment with respect to Plaintiff's excessive force claim against Officer Clee.

3. Excessive Force Claim Against Officer Domanico and Sergeant Bickley

A plaintiff can sustain an excessive force claim against an officer who did not participate directly in her arrest if the officer failed to intervene to prevent the use of excessive force when there was a reasonable opportunity to do so. *See Smith v. Mensinger*, 293 F.3d 641, 650 (3d Cir. 2002). Thus, although there is no evidence that either Officer Domanico or Sergeant Bickley personally used excessive force in the course of Plaintiff's arrest, summary judgment is denied because a jury crediting Plaintiff's version of events could conclude that Defendants Domanico and Bickley did not intervene to prevent Clee from using "unreasonable force." *See id.* Moreover, the requirement to intervene to prevent the use of excessive force was clearly established at the time of the arrest. *See Green*, 2006 WL 2289528, at *6. Accordingly, summary judgment on Plaintiff's excessive force claim against Officer Domanico and Sergeant Bickley is denied.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted in part and denied in part. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANE FAUST,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DAVID CLEE, et al.,	:	**No. 03-1436**
Defendants.	:	

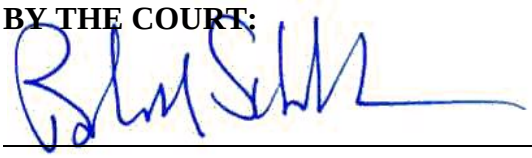
ORDER

AND NOW, the **23rd** day of **October**, **2006**, upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that Defendants' motion (Document No. 21) is **GRANTED in part** and **DENIED in part** as follows:

1. Summary Judgment is **DENIED** with respect to the assault and battery claim against Officer Clee and the excessive force claims against Officer Clee, Officer Domanico, and Sergeant Bickley.

2. Summary Judgment is **GRANTED** with respect to all other claims. Counts III, IV, and V are **DISMISSED** in their entirety. Count II is **DISMISSED** with respect to Officer Domanico and Sergeant Bickley.

BY THE COURT:



Berle M. Schiller, J.